

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOSEPH CUNNINGHAM	:	DETERMINATION
		DTA NO. 820592
for Revision of a Determination or for Refund of	:	
Tax on Cigarette and Tobacco Products under Article	:	
20 of the Tax Law for the Period January 23, 2004.	:	

Petitioner, Joseph Cunningham, P.O. Box 5181, Hempstead, New York 11551, filed a petition for revision of a determination or for refund of tax on cigarettes and tobacco products under Article 20 of the Tax Law for the period January 23, 2004.

On October 20, 2005, the Division of Taxation, by its representative, Christopher C. O'Brien, Esq. (John E. Matthews, Esq., of counsel), filed a motion for an order granting summary determination to the Division of Taxation pursuant to sections 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal on the ground that petitioner failed to file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or a petition with the Division of Tax Appeals for an administrative hearing within 90 days of the issuance of a Notice of Determination to petitioner. The Division of Taxation submitted the affidavit of John E. Matthews, Esq., dated October 19, 2005, with annexed exhibits, in support of its motion. Petitioner did not respond to the motion. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced November 18, 2005. Based upon the motion papers and all the pleadings and proceedings had herein, Thomas C. Sacca, Administrative Law Judge, renders the following order.

ISSUE

Whether summary determination should be granted in favor of the Division of Taxation on the basis that petitioner did not file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or a petition with the Division of Tax Appeals within 90 days after the issuance of a notice of determination to petitioner.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued two notices of determination, dated May 14, 2004 and June 1, 2004, to Joseph Cunningham (“petitioner”) which were addressed as follows: “JOSEPH G. CUNNINGHAM, P.O. Box 5181, Hempstead, NY 11551-5181.” The notices bore assessment identification numbers L-023822439-7 and L-023908640-1 and assessed penalties in the amount of \$6,615.00 and \$2,000.00, respectively, for the period January 23, 2004. The May 14, 2004 Notice of Determination assessed penalty for petitioner’s possession of unstamped or unlawfully stamped cigarettes, or untaxed tobacco products. The June 1, 2004 Notice of Determination assessed penalty for petitioner’s failure to possess a valid New York State certificate of registration for retail sales of cigarettes or tobacco products.

2. On May 19, 2005, the Bureau of Conciliation and Mediation Services (“BCMS”) received a Request for Conciliation Conference dated May 17, 2005. Although a copy of the envelope which contained petitioner’s conciliation request was submitted with the Division’s motion, the U.S. Postal Service (“USPS”) postmark indicating the date of mailing was not reproduced. On June 3, 2005, BCMS issued to petitioner a Conciliation Order Dismissing Request, CMS No. 209572, which stated as follows:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notices were issued on June 1, 2004 and May 14, 2004, but the request was not mailed until May 17, 2005, or in excess of 90

days, the request is late filed. The request filed for a Conciliation Conference is denied.

3. In support of its motion for summary determination, the Division submitted: an affidavit of its representative, John E. Matthews, Esq.; the Division's answer to the petition; affidavits of Geraldine Mahon and Bruce Peltier, employees of the Division; copies of the notices of determination; copies of the Division's certified mail records ("CMR") for May 14, 2004 and June 1, 2004; a copy of petitioner's request for conciliation conference; a copy of the BCMS conciliation order dismissing request; a copy of a Tax Enforcement Referral Report and a copy of petitioner's petition.

4. Geraldine Mahon is the Principal Clerk of the CARTS (Case and Resource Tracking System) Control Unit of the Division. In her affidavit, Ms. Mahon described the Division's general procedure for processing notices of deficiency and determination prior to shipment to the Division's mechanical unit for mailing.

5. Ms. Mahon receives a CMR and the corresponding statutory notices generated by CARTS each of which are predated with the anticipated date of mailing. Each notice is assigned a certified control number which is recorded on the CMR under the heading "CERTIFIED NO."

The CMR for the block of statutory notices issued on May 14, 2004, including the Notice of Determination issued to petitioner, consisted of 7 fan-folded (connected) pages. The CMR for the block of statutory notices issued on June 1, 2004, including the Notice of Determination issued to petitioner, consisted of 31 fan-folded (connected) pages. All pages are connected when the CMR is delivered into the possession of the USPS. The pages remain connected when the CMR is returned to Ms. Mahon's office unless she requests that they be disconnected. The CMR's for the statutory notices mailed via certified mail on May 14, 2004 and June 1, 2004, including the notices issued to petitioner, bear certified control numbers which run

consecutively. Each page of the May 14, 2004 CMR contains 11 entries, with the exception of the last page (page 7) which contains no entries. Each page of the June 1, 2004 CMR contains 11 entries, with the exception of page 9, which contains 10 entries, and page 31, which also contains 10 entries.

6. In the upper left corner starting on page one and on each subsequent page of the May 14, 2004 CMR, the “Run” signifies the date and time the CMR was produced by year, Julian day of the year and military time of the day. The original date and time of “20041251732” was the date and time that the entire CMR was printed. The CMR is printed approximately ten days in advance of the anticipated date of mailing of the particular statutory notices in order to ensure that there is sufficient lead time for the statutory notices to be manually reviewed and processed for postage by the Department’s Mail Processing Center. In the upper left corner of page one of the CMR, the date the notices were mailed was handwritten (“5/14”) by personnel in the Department’s Mail Processing Center. The change was made to ensure that the date on the CMR conformed with the actual date that the statutory notices and the CMR were delivered into the possession of the USPS.

In the upper left corner starting on page 1 and on each subsequent page of the June 1, 2004 CMR, the “Run” signifies the date and time the CMR was produced by year, Julian day of the year and military time of the day. The original date and time of “20041401732” was the date and time that the entire CMR was printed. The CMR is printed approximately ten days in advance of the anticipated date of mailing of the particular statutory notices in order to ensure that there is sufficient lead time for the statutory notices to be manually reviewed and processed for postage by the Department’s Mail Processing Center.

7. Each statutory notice is placed in an envelope by Division personnel and the envelopes are then delivered into the possession of a USPS representative who affixes his or her initials or signature and a U.S. postmark to a page or pages of the CMR. With regard to the May 14, 2004 CMR, the USPS representative affixed a postmark to each page of the CMR, wrote "66" on page 7 of the CMR and initialed or signed pages 1 through 7 of the CMR. Pursuant to the CMR, the total number of statutory notices mailed on May 14, 2004 was 66. With regard to the June 1, 2004 CMR, the USPS representative affixed a postmark to each page of the CMR, wrote "339" on page 31 of the CMR and initialed or signed pages 1 through 31 of the CMR. Pursuant to the CMR, the total number of statutory notices mailed on June 1, 2004 was 339.

8. Page 5 of the May 14, 2004 CMR indicates that a Notice of Determination with notice number L-023822439 was sent to "JOSEPH G. CUNNINGHAM, PO BOX 5181, HEMPSTEAD, NY 11551-5181" by certified mail using control number "7104 1002 9730 0067 4986." A U.S. postmark on each page of the CMR confirms that the Notice of Determination was sent on May 14, 2004.

Page 14 of the June 1, 2004 CMR indicates that a Notice of Determination with notice number L-023908640 was sent to "JOSEPH G. CUNNINGHAM, PO BOX 5181, HEMPSTEAD, NY 11551-5181" by certified mail using control number "7104 1002 9730 0118 5757." A U.S. postmark on each page of the CMR confirms that the Notice of Determination was sent on June 1, 2004.

9. In the regular course of business and as a common office practice, the Division does not request, demand or retain return receipts from certified or registered mail generated by CARTS. The procedures followed and described in Ms. Mahon's affidavit were the normal and regular procedures of the CARTS Control Unit on May 14, 2004 and June 1, 2004.

10. Bruce Peltier is a Mail and Supply Supervisor in the Registry Unit of the New York State Department of Taxation and Finance. He is fully familiar with the operations and procedures of the Mail Processing Center and supervises Mail Processing Center staff, including the staff that processes and delivers outgoing mail to the various branches of the USPS.

11. Statutory notices which are ready for mailing to taxpayers are received by the Mail Processing Center in an area designated "Outgoing Certified Mail." A CMR is also received by the Mail Processing Center for each batch of statutory notices. A member of the staff operates a machine which puts each statutory notice into an envelope, weighs and seals the envelope and places postage and fee amounts on the envelope. A mail processing clerk checks the first and last pieces of certified mail listed on the CMR against the information listed on the CMR.

12. A member of the staff then delivers the sealed, stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York area. A USPS employee will then affix a postmark and/or his or her initials or signature to the CMR indicating receipt of the mail listed on the CMR and the CMR itself. The USPS has further been requested by the Mail Processing Center to either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the CMR. As a matter of standard procedure and to insure accountability, the CMR may be left overnight at the post office to enable the postal employee to process the certified mail and to make the appropriate notations on the CMR. The CMR is then picked up at the post office on the following day by a member of Mr. Peltier's staff whereupon it is delivered to the CARTS control unit. The CMR retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon.

13. A USPS employee affixed a postmark to each page of the May 14, 2004 CMR, initialed or signed pages 1 through 7 of the CMR and wrote the total number of pieces of certified mail received. The last page of the CMR, page 7, indicates that 66 pieces were delivered to the USPS.

For the June 1, 2004 CMR, a USPS employee affixed a postmark to each page, initialed or signed pages 1 through 31 of the CMR and wrote the total number of pieces of certified mail received. Page 31 of this CMR originally listed 340 pieces of mail; however, the number of pieces received at the post office shows 339 in order to reflect the fact that one piece of certified mail had been “pulled” from the mailing record for that page. Therefore, Page 31 of this CMR now indicates that a total of 339 pieces of mail listed were delivered to the USPS.

14. A piece of mail may be “pulled” for any number of reasons, including but not limited to a discrepancy in a name or address. Any piece of mail so “pulled” will be segregated from the remaining group of statutory notices for correction and issuance at another time.

15. As noted previously, the June 1, 2004 CMR reflects that one piece of mail was “pulled.” The piece that was pulled was listed on page nine of the CMR. That piece of mail had been assigned certified control number 7104 1002 9730 0118 5191. A line was appropriately placed through the entry for that taxpayer after the statutory notice was “pulled.” That deletion is reflected in the change of the total pieces received at the post office on page 31 of the CMR. No such mark is made on or near the listing for petitioner, Joseph G. Cunningham.

16. The procedures described in Mr. Peltier’s affidavit are the regular procedures followed by the Mail Processing Center staff in the ordinary course of business when handling items to be sent by certified mail, and such procedures were followed on May 14, 2004 and June 1, 2004.

17. The Tax Enforcement Referral Report, dated January 26, 2004, lists petitioner's name, social security number, date of birth, address, driver's license number and the date and description of certain violations of the Tax Law. The report indicates petitioner's address to be "P.O. Box 5181, Hempstead, NY 11551." The date of violation is "January 23, 2004" and the description of violation is "[a]ttempt to evade/defeat cigarette tax," "[p]ossession of untaxed cigarettes for sale" and "[n]o certificate of registration."

18. Petitioner's Request for Conciliation Conference and Petition indicate petitioner's address to be P.O. Box 5181, Hempstead, NY 11551.

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Here, petitioner did not respond to the Division's motion; he is therefore deemed to have conceded that no question of fact requiring a hearing exists (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *John Wm. Costello Assoc. v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325). Moreover, petitioner presented no evidence to contest the facts alleged in the Mahon and Peltier affidavits; consequently, those facts may be deemed admitted (*see, Kuehne & Nagel v. Baiden, supra*, at 544, 369 NYS2d at 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173).

C. Tax Law § 478 authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer if a return required under Article 20 of the Tax Law is not filed or if a return when filed is incorrect or insufficient. Pursuant to such section, such determination "shall finally and

irrevocably fix the tax” unless the person against whom it is assessed files a petition with the Division of Tax Appeals seeking revision of the determination within 90 days of the mailing of the notice. As an alternative to filing a petition with the Division of Tax Appeals, a taxpayer may request a conciliation conference with the Division of Taxation’s Bureau of Conciliation and Mediation Services. The time period for filing such a request is also 90 days (Tax Law § 170[3- a][a]). The filing of a petition or a request for conciliation conference is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

D. Tax Law § 480-a(2)(d) provides that the provisions of Article 28 of the Tax Law relating to the personal liability for the tax, administration, collection and determination of tax shall apply to Article 20 of the Tax Law in the same manner and with the same force and effect as if those provisions of Article 28 had been fully incorporated into Article 20. Tax Law § 1147(a)(1), contained within Article 28, provides that a Notice of Determination shall be mailed by certified or registered mail to the person for whom it is intended “at the address given in the last return filed by him pursuant to [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable.” The mailing of such notice “shall be presumptive evidence of the receipt of the same by the person to whom addressed.” (*Id.*)

E. When the timeliness of a request for a conciliation conference or a petition is at issue, the Division bears the burden of proving both the date and fact of mailing of the statutory notice (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The mailing evidence required of the Division is two-fold: first, there must be proof of a standard procedure used by the Division

for the issuance of the statutory notice by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

In the present matter, the affidavits of two Division employees, Geraldine Mahon (Principal Clerk of the CARTS Control Unit) and Bruce Peltier (Mail and Supply Supervisor in the Division's Mail Processing Center) provide adequate proof of the Division's standard procedures for the mailing, by certified mail, of notices of determination. The affidavits generally describe the procedures employed and further attest to the authenticity and accuracy of the copies of the notices of determination and the certified mail records submitted as evidence of actual mailing of the notices to petitioner.

Moreover, such affidavits and the certified mail records establish that such procedures were followed with respect to the notices of determination issued by the Division on May 14, 2004 and June 1, 2004. Specifically, the 7-page May 14, 2004 CMR and the 31-page June 1, 2004 CMR listed certified control numbers with corresponding names and addresses including, on pages 5 and 14, respectively, petitioner's certified control number, statutory notice number and his name and address. All seven pages of the May 14, 2004 CMR bore a USPS postmark of that date. In addition, the postal employee who received all of the Division's certified mail on May 14, 2004 signed or initialed each page of the CMR and wrote "66" on the final page to indicate receipt by the post office of all 66 pieces of mail listed thereon. With regard to the June 1, 2004 CMR, all 31 pages bore a USPS postmark of that date, the postal employee who received all of the Division's certified mail on June 1, 2004 signed or initialed each page of the CMR and wrote "339" on the final page to indicate receipt by the post office of 339 pieces of mail,

reflecting the fact that one piece of mail had been “pulled”. Furthermore, the Division established through the introduction of the Tax Enforcement Referral Report that the address to which the notices of determination were mailed was taken from petitioner’s driver’s license. This evidence is sufficient to establish that the Division properly mailed the subject notices of determination to petitioner on May 14, 2004 and June 1, 2004.

F. As noted herein, the copy of the envelope in which petitioner’s request for a conciliation conference was filed did not include the USPS date of mailing postmark. However, petitioner’s request for a conciliation conference could not have been filed earlier than May 17, 2005, the date petitioner signed the request. This date falls beyond the 90-day period of limitations for the filing of such a request. Petitioner’s request was therefore untimely filed (*see*, Tax Law § 478, § 480-a(2)(d); § 170[3-a][a]).

G. The Division of Taxation’s motion for summary determination is granted and the petition of Joseph Cunningham is hereby dismissed.

DATED: Troy, New York
January 19, 2006

/s/ Thomas C. Sacca

ADMINISTRATIVE LAW JUDGE